

APPENDIX 2



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

JAN 30 2009

Mr. David K. Paylor
Director
Virginia Department of Environmental Quality
629 E. Main Street
Richmond, Virginia 23219

Dear Mr. Paylor:

It has come to the U.S. Environmental Protection Agency's (EPA) attention that there is legislation under consideration by the Virginia General Assembly that has the potential to undermine our common efforts to protect and restore the Chesapeake Bay and the waters of the Commonwealth of Virginia. EPA's concerns regarding the proposed legislation are outlined below.

EPA understands that Virginia House Bill 2074 and Senate Bill 1022 would require the State Water Control Board to adopt regulations providing an exception to the Total Maximum Daily Load (TMDL) allocations for certain wastewater treatment plants. The exception would allow up to five additional years to conform to the TMDLs for wastewater treatment plants that serve urbanized areas or those which have begun construction on an expansion or an upgrade by December 31, 2010. This legislation would appear to be an attempt to supersede the Clean Water Act (CWA) and the National Pollutant Discharge Elimination System (NPDES) requirements in which all NPDES discharges must comply in order to achieve water quality standards, including any applicable TMDLs. House Bill 2323 would mandate that the Virginia Department of Environmental Quality (DEQ) continue to assign wasteload allocations for a period of up to 10 years to Fauquier County Water and Sanitation Authority/Vint Hill wastewater treatment facility in the amount of 8,680 pounds per year of total nitrogen and 868 pounds per year of total phosphorus, notwithstanding whether the construction of upgrades is completed on or before December 31, 2010. Any wasteloads must be consistent with those established in the Chesapeake Bay Watershed General Permit and with the Bay TMDL when completed. All NPDES permits must be written so as to achieve water quality standards and include wasteload allocations. Those proposals purport to either increase the wasteload allocations and/or make wholesale adjustments to compliance schedules for point source discharges under the NPDES program. These proposed changes do not appear consistent with CWA and NPDES requirements. Such changes may represent a substantial modification of Virginia's NPDES permit program, and must be submitted to EPA for review and approval.

Working with EPA, Virginia developed an NPDES permit strategy to implement the *Chesapeake Bay 2000 Agreement* as well as the *NPDES Permit Approach for Discharges of Nutrients in the Chesapeake Bay Watershed* (EPA, 2004). As agreed to by the Executive Council for the Chesapeake Bay in Directive 03-2 and reaffirmed in Directive 04-2, each watershed was assigned a nutrient cap load in order to provide for restoration of the Chesapeake Bay water quality. Virginia further allocated its watershed specific cap loads through Virginia's Tributary Strategy to point and nonpoint sources of nutrients. Virginia developed the Virginia Chesapeake Bay Watershed General NPDES Permit, and an associated trading program to specifically address the point source allocations for each Virginia watershed in the Chesapeake Bay. EPA's Chesapeake Bay Program verified that those cap loadings were sufficient to achieve Bay water quality. Based on the assignment of wasteload allocations and EPA evaluation of the applicable cap load, EPA found that the General Permit ensured that individual point source discharges would not cause or contribute to an exceedance of the applicable Bay water quality standards.

Using that analysis, EPA reviewed DEQ's September 20, 2006 submission of the Chesapeake Bay Watershed General Permit and associated documentation. In a letter dated December 14, 2006, EPA reported "no objection" to the General Permit but made several specific comments. On compliance schedules, EPA noted that any compliance schedules must be consistent with federal requirements. Compliance schedules may be allowed under the NPDES program only under certain conditions. These conditions have been articulated in a memorandum dated May 10, 2007 from James Hailon, Director, Office of Wastewater Management, EPA Headquarters to Alexis Strauss, Director Water Protection, and EPA Region 9 (enclosed). In order to allow a compliance schedule, the permitting authority must make a determination supported by an administrative record that the time needed to comply is appropriate and "as soon as possible". Compliance schedules cannot be based on the maximum time allowed by a state's authorizing provision. Any change to an NPDES permit which modifies the compliance date or schedule is considered a major modification, subject to EPA review and potential objection if warranted.

On the issue of adjustment to wasteload allocations for individual point sources, EPA noted that such adjustments would amount to an NPDES permit modification and as such should be submitted to EPA for review. Based on commitments set forth in *Chesapeake Bay 2000 Agreement*, Executive Council Directives 03-2 and 04-2, the 2006 Bay Permitting Approach, as well as federal NPDES permitting requirements, EPA believes that if the proposed modifications are enacted, such modifications would amount to a modifications of the Virginia NPDES Permit Program and the Chesapeake Bay Watershed General Permit, and should be submitted to EPA for review as provided in the CWA and the Memorandum of Understanding between EPA and Virginia on the NPDES Permit Program. If these modifications increase point source loadings beyond the cap loads, EPA would evaluate whether those point source(s) cause or contribute to an exceedance of the applicable Bay water quality standards.

In addition to EPA's regulatory concerns with the proposed increases in loadings and extensions of compliance schedules proposed, it is important to also note that Virginia's actions could have an adverse impact on Chesapeake Bay partnership of states, a partnership that must remain unified in their efforts to upgrade wastewater treatment facilities to restore the



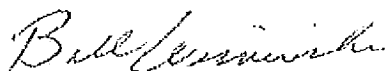
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Chesapeake Bay. More markedly, other partner states, especially upstream states like Pennsylvania, New York, and West Virginia, may view Virginia's efforts to relax the loading levels of some point sources as a signal of acceptance for other states to do likewise. Succinctly, Virginia's proposal to relax the nutrient loadings for some facilities threatens to unravel the successful efforts of all of our state partners in an unprecedented nutrient upgrade of almost 500 wastewater facilities in the Bay watershed.

EPA looks forward to continuing to work with you and your staff on restoration of the Chesapeake Bay. EPA acknowledges Virginia's continued support for the upgrade of wastewater treatment plant that achieves both local and Bay water quality improvements. EPA is committed to continue to support funding through CWA programs such as the State Revolving Fund that supports these important local investments.

Thank you for your continued strong support of our efforts to protect and restore the Chesapeake Bay. If you would like to discuss this matter further, please contact me or Mrs. LaRonda Koffi, EPA's Virginia Liaison, at 215-814-5374.

Sincerely,


William T. Wisniewski
Acting Regional Administrator

Enclosure